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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell Petition for)
Relief from Regulation Pursuant to Section)
706 of the Telecommunications Act of)
1996 and 47 U.S.C. § 160 for ADSL)
Infrastructure and Service)

CC Docket No. 98-91

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JUN 24 1998

INTERMEDIA COMMUNICATIONS INC.
COMMENTS OPPOSING PETITION OF
SOUTHWESTERN BELL TELEPHONE COMPANY,
PACIFIC BELL, AND NEVADA BELL FOR RELIEF FROM REGULATION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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**INTERMEDIA COMMUNICATIONS INC.
COMMENTS OPPOSING PETITION OF
SOUTHWESTERN BELL TELEPHONE COMPANY,
FOR DEREGULATION OF ADSL SERVICES AND FACILITIES**

Intermedia Communications Inc., ("Intermedia") by its undersigned counsel and pursuant to the Commission's Public Notice dated June 11, 1998¹ hereby submits its Comments in opposition to the Petition filed by Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (jointly, "SBC") which seeks deregulation of SBC's asynchronous digital subscriber line ("ADSL") facilities and services.² As Intermedia discusses below, such action would have a dramatic impact on competitive telecommunications markets that would achieve exactly the opposite of what the SBC projects – it would profoundly inhibit the growth of competition and the deployment of advanced telecommunications services and facilities throughout the country. SBC's petition is a transparent attempt to insulate a promising new technology – and the services

¹ *Pleading Cycle Established for Comments on SBC Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, Public Notice, CC Docket No. 98-91 (June 11, 1998).

² *In re Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91 (June 9, 1998) ("Petition").

it makes possible – from the procompetitive mandates of the Telecommunications Act of 1996,³ including interconnection, collocation, the provision of unbundled network elements, and resale. The patently anticompetitive nature of the SBC petition compels its summary denial.

I. INTRODUCTION

SBC's petition to deregulate its ADSL facilities and services essentially echoes arguments made by Bell Atlantic, U S West and Ameritech in the Section 706 petitions that they recently have filed with the Commission. As such, SBC's petition is similarly flawed. Rather than repeat the arguments that Intermedia, ALTS and other collocate competitive local exchange carriers' ("CLECs") raised against the other Section 706 petitions, Intermedia will adopt those comments by reference herein. As Intermedia demonstrated in its earlier comments, the incumbent local exchange carriers ("ILECs") petitions are fatally flawed in that they are premised on an assumption that the new digital subscriber line technology being deployed by ILECs, and the new services that such deployment makes possible, are somehow severable from the existing public switched network ("PSN"). As Intermedia and others have shown, the ILECs – like the CLECs – are not building a new data network that is parallel to the PSN. Rather, DSL is an incremental and evolutionary improvement to the existing circuit switched networks. Moreover, the rollout of this technology is but the first step in a process that will, in the near future, convert the existing PSN to a fully digital, packet switched network that will carry traditional telephony as well as the dramatic new high-bandwidth services that DSL and other new technologies are making possible.⁴ For these reasons, any regulatory structure that would

³ Telecommunications Act of 1996, 47 U.S.C. §§ 151-614 ("Act").

⁴ *In re Petitions of Bell Atlantic Corp., Ameritech Corp., and U S West Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, Comments of
(continued...)

accord different treatment to facilities and services based on their use of specific types of technology is unsupportable as a legal matter, undesirable as a matter of public policy, and would be impossible to implement.

II. THE PLAIN LANGUAGE OF THE TELECOMMUNICATIONS ACT PROHIBITS THE COMMISSION FROM PROVIDING THE RELIEF SOUGHT BY SBC.

SBC's pleading is a transparent attempt to insulate a single technology – and the new high-speed internet access service that SBC is now introducing in its service territories – from the procompetitive policies of the Act. The Act clearly established interconnection, collocation, the provision of unbundled network elements (“UNEs”) and resale as the fundamental means by which competitive carriers will enter local service markets long dominated by ILECs. Despite the clear intent of the Act, however, SBC contends that the Commission has independent authority under Section 706 to eliminate SBC's obligation to interconnect with competitors' ADSL-based networks; collocate CLECs' ADSL equipment; provide UNEs that can be used to provision competitive ADSL-based services; or resell SBC's ADSL-based services. As Intermedia discusses below, SBC's claims are wholly without merit, and the relief it requests would violate the express language of Section 10 of the Act.

A. Section 10(d) of the Act prohibits forbearance of the procompetitive provisions of §§ 251, 252 and 271 of the Act until these provisions have been fully implemented.

(...continued)

Intermedia Communications Inc. Opposing Deregulation of Incumbent Local Exchange Carrier Data Networks and Services, CC Docket Nos. 98-11, 98-32 and 98-26 at pages 3-11 (Apr. 6, 1998).

The Commission's authority to forbear from implementing provisions of the Act is defined in Section 10⁵ -- a section that the Regional Bell Operating Companies ("RBOCs") conveniently have chosen to ignore. Section 10(d) of the Act states that:

[e]xcept as provided in Section 251(f), the *Commission may not forbear from applying the requirements of Section 251(c) or 271* under subsection (a) of this section until it determines that those requirements have been fully implemented.⁶

By this language, the Act expressly prohibits the Commission from using its forbearance authority to eliminate the interconnection, collocation, unbundled network element ("UNE") and resale requirements that the Act imposes on ILECs until it has been demonstrated that those provisions have been fully implemented.

This restriction on the Commission's forbearance authority is mirrored in the language of Section 271 of the Act, which establishes the 14-point competitive checklist that ensures that the procompetitive provisions of Sections 251 and 252 must be fully implemented before a Bell operating company can obtain authority to provide in-region interLATA services. Subsection 271(d)(4) provides that "[t]he *Commission may not*, by rule or otherwise, *limit* or extend the terms used in *the competitive checklist*" which the Petitioners must meet before being granted in-region interLATA authority.⁷ This express language makes clear that Congress regarded strict compliance with the Section 271 competitive checklist as sufficiently critical to expressly bar the Commission from waiving its requirements.

⁵ 47 U.S.C. § 160.

⁶ *Id.* § 160(d) (emphasis added). The limitation in Section 10(d) includes an exception for rural carriers per Section 251(f). Inclusion of this exception precludes the prospect that additional exceptions may be available.

⁷ 47 U.S.C. § 271(d)(4) (emphasis added).

Indeed, in response to inquiries made by Senator McCain, individual Commissioners recently have recognized that Section 10(d) appears to preclude the Commission from forbearing from applying Section 271 requirements in the context of a Section 271 petition. For example, although expressly reserving final judgment, Chairman Kennard recently informed Senator McCain that “[S]ection 10(d) appears to preclude the Commission from forbearing from applying section 271 until section 271 has been fully implemented and does not contain any express exception for section 706.”⁸ Each of the other Commissioners concurred in this assessment.⁹

In the face of this unequivocal language in the Act, SBC’s claims of a separate source of forbearance authority that circumvents the express requirements of Sections 10 and 271 must be rejected.

B. SBC’s attempt to introduce the concept of “dominance” in the provision of ADSL-based services is irrelevant to any legal or policy analysis involving the elimination of the procompetitive provisions of the Act.

SBC attempts to support its argument for deregulation of ADSL-based services by arguing that it is not “dominant” in the provision of such services, and concludes that deregulation therefore would serve the public interest.¹⁰ SBC’s attempt to introduce the concept of dominance into the current debate over deregulation of ADSL facilities and services is wholly

⁸ Letter from William E. Kennard, Chairman, FCC, to Hon. John McCain, U.S. Senator at 9 (Apr. 29, 1998).

⁹ Letter from Susan Ness, Commissioner, FCC, to Hon. John McCain, U.S. Senator at 7 (Apr. 29, 1998); Letter from Michael Powell, Commissioner, FCC, to Hon. John McCain, U.S. Senator at 5 (Apr. 29, 1998); Letter from Gloria Tristani, Commissioner, FCC, to Hon. John McCain, U.S. Senator, response to Q. 17 (Apr. 29, 1998); Letter from Harold Furchgott-Roth, Commissioner, FCC, to Hon. John McCain, response to Q. 17 (Apr. 29, 1998).

irrelevant, however, as a matter of law and as a matter of fact. First, the Act does not condition the obligations imposed upon ILECs by §§ 252(c) or 271, and there is no basis for the contention that a finding of non-dominance in any particular service market can eliminate the ILEC's obligations under those sections of the Act.¹¹

Second, SBC will not use ADSL equipment only to provide high-speed internet access and other ADSL-based services. Rather, it will continue the practice that it has followed for years, and will use ADSL and other digital subscriber line technologies to provide traditional telecommunications services – from residential and business “plain old telephone service” to special access and private line services. SBC's practices were clarified by one of its witnesses in a recent proceeding before the Public Utilities Commission of Texas (“TX PUC”) that evaluated – and ultimately rejected – SBC's petition for a recommendation in favor of interLATA relief.

In that proceeding, SBC witness Michael Auinbauh noted that:

We offer DSL – HDSL, in particular, as deployed in Southwestern Bell's territory as a means of delivering a DS1 electrical interface, and we offer a DS1 loop as a standard offering in interconnection agreements. And so the underlying technology, whether it is through multiplexed fiber systems down to four-wire copper, whether it's repeated copper that has repeaters on it or HDSL isn't offered separately. We offer the DS1 as the electrical interface at each end, so that I guess what I'm trying to say is it doesn't matter what the underlying technology is, we deliver the DS1. And that's

(...continued)

¹⁰ Petition at 25-32.

¹¹ Moreover, even if an argument that a finding of non-dominant status justifies elimination of the Section 251 and 271 requirements could credibly be made – *and it cannot* – the Commission has an established process for analyzing product markets and determining whether a carrier is dominant or non-dominant in the provision of a given service. *See In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, paras. 19-73 (1995). SBC has not even attempted to justify its claims of non-dominance using the Commission's established analytical standards. SBC's claims of non-dominance in the provision of ADSL-based services therefore are nothing more than an unsupported *ipse dixit*, and must be rejected.

what you get from it, HDSL.¹²

In so stating, the SBC witness made clear that SBC currently uses various forms of DSL equipment – including both HDSL and ADSL – to provide both tariffed DS1 services and DS1 unbundled loops – services for which it is undoubtedly a dominant carrier.

C. RECENT FINDINGS BY THE PUBLIC UTILITIES COMMISSION OF TEXAS DEMONSTRATE THAT THE PUBLIC INTEREST WOULD NOT BE SERVED BY A GRANT OF THE RELIEF SOUGHT BY SBC.

The most compelling evidence against a grant of SBC's Section 706 Petition is presented in the recently-completed Section 271 proceeding conducted by the TX PUC. Following an exhaustive proceeding, over which all three Commissioners presided, the TX PUC unanimously voted against recommending interLATA relief for SBC. In doing so, the Commissioners expressly found that SBC had failed to implement the interconnection, collocation, UNE and resale obligations imposed by Sections 251, 252 and 271 of the Act. Moreover, the Commissioners found repeated instances in which SBC had refused to implement explicit Commission directives, abused the regulatory process, initiated litigation in order to delay implementing the requirements of the Act, and repeatedly sought to evade its obligations under the Act. Even a cursory review of the opening statements of the Commissioners that accompanied their rejection of SBC's Section 271 request demonstrates the intransigence and bad faith that were depicted in the record of the proceeding.

For example, Chairman Walsh stated: "We personally presided over those lengthy arbitration hearings and their excruciating detail in order to resolve these issues once and for all

¹² *Project No. 16251, Investigation into Southwestern Bell Telephone Company's Entry into in-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1992*, Transcript at pages 814-15 (Apr. 22, 1998).

only to find that we have minimal competition in Texas, today, two years later. . . . a piece of paper [interconnection agreement] doesn't mean much if the incumbent really isn't interested in making this work."¹³

Similarly, Commissioner Curran found that:

While SWB has entered scores of agreements, certain of SWB's actions indicate that SWB doesn't consistently view all agreements as binding in nature SWB's legal challenges [relating to the terms of arbitration agreements] indicate that SWB is not committed to perform under the disputed terms of the agreement if it can prevail. . . . The problems such appeals create . . . is the uncertainty in the business arrangement and the impression that [SWB] is using the legal process, not to protect its rights, but to thwart the process.¹⁴

* * * * *

We cannot be assured that competition will become irreversible in Texas until SWB is committed to treating CLECs as customers rather than as competitors. This change in business attitude is entirely within SWB's power. . . . It can demonstrate this good faith by removing barriers that it has put in place and by its commitment to institutionalize clear and nondiscriminatory procedures to allow CLEC's entry into the market and to sustain new customer relationships.¹⁵

And Commissioner Walsh observed: "The record is replete with examples of SWB's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers, and evidence of behavior which obstructs competitive entry."¹⁶

¹³ *Opening Statements by Commissioners of the Public Utilities Commission of Texas at the Open Meeting in Project No. 16251, Investigation into Southwestern Bell Telephone Company's Entry into in-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996*, Statement of Chairman Patrick Wood III at 1 (May 21, 1998).

¹⁴ *Id.*, Statement of Commissioner Patricia A. Curran at 2.

¹⁵ *Id.* at 5.

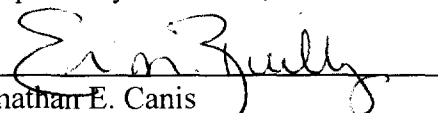
¹⁶ *Id.*, Statement of Commissioner Judy Walsh at 1.

While these findings were made during the course of a Section 271 proceeding, they nevertheless function as persuasive evidence of SBC's unwillingness to comply with its legal obligations under the Act, and raise the important question of just how likely it is that SBC will play fair and that genuine competition will flourish in an deregulated market for advanced telecommunications services, given SBC's well-documented resistance to the mandates imposed upon them under Sections 251, 252 and 271 of the Act. In light of the above-referenced unanimous findings by a State Commission that has developed the most exhaustive and the most current record of SBC's performance under the Act, this Commission cannot accept SBC's assertions that deregulation of its ADSL services and facilities would serve the public interest. Rather, it is clear that the deregulatory relief sought by SBC would simply enable it to expand its well-documented pattern of stonewalling competition, and refusing to implement the procompetitive mandates of the Act.

III. CONCLUSION

For the reasons discussed above, Intermedia respectfully requests that the Commission deny SBC's petition to deregulate its ADSL services and facilities.

Respectfully submitted,


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June 24, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of June, 1998, served this day a copy of the foregoing INTERMEDIA COMMUNICATIONS INC. COMMENTS OPPOSING PETITION OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL FOR RELIEF FROM REGULATION by first class mail, postage-prepaid, to the following:

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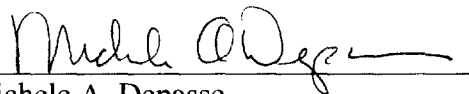
Michele A. Depasse

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of June, 1998, served this day a copy of the foregoing INTERMEDIA COMMUNICATIONS INC. COMMENTS OPPOSING PETITION OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL FOR RELIEF FROM REGULATION by hand delivery to the following:

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